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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. ~~1840~~ 120

DONALD L. UNDERWOOD, CORA UNDERWOOD,
PAULINE UNDERWOOD, D. W. UNDERWOOD,
ED. MICHALOWSKI, *Petitioners,*

v.

HAROLD L. ICKES, Secretary of the
Interior, *Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA AND BRIEF
IN SUPPORT THEREOF.**

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ED. MICHALOWSKI, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the
Interior, *Respondent*.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA.**

*To the Honorable Harlan Fiske Stone, Chief Justice, and
the Associate Justices of the Supreme Court of the
United States:*

Donald L. Underwood, Cora Underwood, Pauline Underwood, D. W. Underwood, and Ed. Michalowski, respectfully pray for a writ of certiorari to the United States Court of

Appeals for the District of Columbia, to review a judgment entered in the above matter on March 20, 1944.

A certified transcript of the record before the United States Court of Appeals for the District of Columbia, and the proceedings in that Court, are presented herewith in accordance with Rule 38 of this Court.

SUMMARY OF THE MATTER INVOLVED.

The judgment of the Court of Appeals of which review is sought, reversed a judgment of the United States District Court for the District of Columbia, in favor of petitioners, enjoining the Secretary of the Interior from preventing the recovery by petitioners of a large deposit of sand and gravel on the public lands near the Grand Coulee Dam in the State of Washington.

November 11, 1933, petitioners made the discovery and location, and promptly and fully complied with all requirements necessary to entitle them to recover and sell the sand and gravel. April 5, 1934, the Government initiated a so-called "contest" or "adverse proceeding" against the petitioners to defeat their claim. The contest was litigated in the Interior Department for six years and three months (April 11, 1934 to July 11, 1940), and finally ended in a decision against petitioners.

July 29, 1940, petitioners filed a complaint in the District Court of the United States for the District of Columbia asking that the Secretary be required to set aside the adverse decision. A motion to dismiss the Complaint was overruled. Respondent then filed an Answer containing allegations in all respects substantially like those stated in the Complaint. The Complaint and Answer contained complete verbatim copies of the ten decisions or opinions made in the case in the Interior Department. The case was decided for petitioners by the District Court on motion for summary judgment, and judgment was entered on July 14, 1942.

The facts are not in dispute. The opinion of the Court of Appeals does not state the facts in the case. The opinion is brief and consists of a general statement of the issues before, and the action, of the Secretary, a statement of the conventional rule with regard to judicial review of administrative agencies, a general statement that petitioners are not entitled to relief and that the action of the Secretary was valid. On its face, the opinion is probably a correct statement of the law. If the opinion had included a fair and correct statement of the factual situation to which the decision was applied, its revolutionary and erroneous character would be apparent.

Under the rule that statements in a court's opinion are to be taken in connection with the facts of the case, petitioners are entitled to have the opinion and decision considered in the light of the facts to which it is applied, even though they are omitted from the opinion.

The facts are stated in the Complaint and Answer and the exhibits attached thereto, and are as follows:

Before the effort to deprive petitioners of the location was begun in the Interior Department, petitioners had engaged engineers and contractors and had spent in excess of \$5,000 in preliminary efforts to develop the deposit. (R. 3, 70). The deposit contained 2,620,138.8 cubic yards of sand and gravel, and was worth about \$262,013.88 in the bank. (R. 67, 69). Of course, further substantial expenditures would have been necessitated by the work of recovery.

The attack on the claim by the Secretary of the Interior was based on five charges; i. e., (1) that the claim was located for purposes other than mining, (2) that the claim was located for speculative purposes, (3) that the claimants had not performed the amount of work required by law, (4) that mineral had not been found on the land in sufficient quantities to constitute a valid discovery, and (5) that the land was non-mineral in character.

All of these charges were proved to be unfounded and the facts were finally found by the Secretary in favor of petitioners. Upon that finding, all that remained for the Secretary was a ministerial function. Nevertheless, the claim was denied because of a suspicion that petitioners were guilty of fraud, and because of a special and onerous burden of proof with regard to value which the Secretary decided arose and came into play because of the suspicion. The alleged fraud, suspicion and special burden of proof were stated in the final decision against petitioners as follows (R. 116):

While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not free from the suspicion by reason of the selection of the site for location that the possibility of appropriation thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. It is the opinion of the Department that in the decisions below there was material error in the estimation and appreciation of the evidence; therefore they must be reversed and the decisions holding the claim invalid affirmed.

Petitioners sought a rehearing on the ground that the suspicion and this rule of evidence amounted to prejudicial error. The decision was upheld, however, and the rule even more strongly stated as follows:

I cannot agree that these remarks as to the burden of proof amount to prejudicial error. It is a settled rule in this Department that where land has a present or potential value for purposes other than mineral, that fact must be taken into consideration in determining the character of the land. Under such circum-

stances the evidence of mineral value, in order to sustain the validity of the claim, must be *more clear and convincing* than in cases where there is no conflict with other present or potential values. (R. 121.)

It will be noted that two possibilities are stated as the reasons for the suspicion; first, the *possibility* of appropriation of the land by the Government; and, second, that the first possibility *might have been* contemplated.

In the Interior Department, a long established administrative procedure for adjudicating such cases has long obtained. Pursuant to the rules of practice and statutes governing this procedure, actions like the present concerning rights in public lands are originated in the office of the Register. Any objections to such acquisitions are also lodged in the first instance with the Register. From the decision of the Register for or against a claimant, an appeal may be taken to the Commissioner of the General Land Office, and from the Commissioner to the Secretary of the Interior. The Rules of Practice apply at each stage of the proceedings, before the Register, before the Commissioner, and before the Secretary.

This case has twice traversed the procedural route in the Interior Department. Originally it was before the Register; from the Register it went to the Commissioner; and from the Commissioner to an Assistant Secretary; then back to the Register; and again from the Register to the Commissioner; and finally from the Commissioner to an Under Secretary.

The attack on the claim was originated before the Register at Spokane on the five charges above referred to.

1. The charges were answered, hearings were held, and on June 12, 1935, the Register rendered a decision holding that none of the charges had been sustained. (R. 57)

2. July 10, 1935, the Commissioner of the General Land Office reversed the decision of the Register on the ground that the sand and gravel was deficient in quality, that there

were other deposits of better gravel, and that there was no market for its sale. (R. 61)

3. March 23, 1936, the First Assistant Secretary affirmed the Commissioner, and decided against the claim, on the ground (1) that petitioners probably located the claim because of a probability that the land would have a condemnation value; (2) that they had not met a special and unusually onerous burden of proof which applied because of that probability; (3) that the evidence as to quality was conflicting; (4) that the sand and gravel was not marketable because the demand could be supplied from other pits; and (5) that the only value of the sand and gravel was prospective. (R. 74).

4. September 9, 1937, the First Assistant Secretary granted a petition to reopen the case, on the ground that his previous ruling of March 23, 1936, that prospective value was inadmissible, was erroneous. (R. 87)

5. November 29, 1938, the case having gone back to the Register pursuant to the above decision, the Register (this time a person other than the Register who first passed on the case), decided for petitioners on the ground that the sand and gravel had a market value and could be sold at a profit. (R. 101).

6. February 28, 1939, the Commissioner (who had previously reversed the Register, and decided against petitioners) this time affirmed the Register and decided for petitioners, on the ground that the evidence conclusively showed that there was prospective market value for the sand and gravel. (R. 103.) Petitioners rely upon this decision, contending that it was the last valid and controlling decision.

7. August 11, 1939, an Under Secretary of the Interior reversed the Commissioner and decided against petitioners, on the ground that (1) because the demand for sand and gravel could be supplied by other deposits, the claim

had no value and (2) because there was a "suspicion" that petitioners "might have" selected the site on the "possibility" that it would be appropriated by the Government. (R. 107.) This and the decision which follows were the final decisions against petitioners. Respondent relied on these decisions.

8. June 14, 1940, an Assistant Secretary of the Interior, on a motion for rehearing, decided against petitioners, on the ground (1) that in his decision against the petitioners of August 11, 1939, the Under Secretary had a right to disregard his own Rules of Practice; (2) that, in reversing the Register and the Commissioner, the Under Secretary had a right to disregard their findings of fact and to adjudge the case and make opposite findings de novo; (3) that the Under Secretary had a right to base his decision on the suspicion that petitioners had located the claim on the possibility that it might be appropriated by the Government; and (4) that because of such suspicion, value must be shown by more clear and convincing evidence than if such suspicion had not existed. (R. 117.)

The fraud of which petitioners were suspected was that they had made the location, not for the purpose of recovering the sand and gravel, but to profit by condemnation of the land for the use of the dam. The Department had actually thoroughly investigated the subject, and had found nothing to justify the suspicion. (R. 42.) As to the information produced by the investigation, the Commissioner of the General Land Office, stated:

I am unable to find any evidence of any intent on the part of the locators at the time the location was made to use the claim for purposes other than mining, nor do I find any speculative intent has been proven. It is true the location was made in the immediate vicinity of a proposed dam site with the evident hope of benefiting from the construction of necessary works at and near the projected dam and the locators were opportunists of the most obvious sort. But the land was

open to location upon a valid discovery of mineral by any qualified person or persons and in the absence of a clear intent to speculate in or otherwise use the land for purposes other than mining, it must be presumed that the locators' intent was to acquire the land for purposes consistent with the laws under which the claim was initiated. (R. 63)

In the final decision against petitioners, the same view as to any evidence to fraud was stated, thus:

. . . there is no positive evidence . . . that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government . . . (R. 116)

BASIS OF JURISDICTION.

The statute under which jurisdiction of this Court is invoked is section 240 (a) of the Judicial Code (28 C. A., sec. 347 (a)).

The judgment sought to be reviewed was entered on March 20, 1944, and the date upon which this petition for certiorari is presented is June 2, 1944.

QUESTIONS PRESENTED.

1. Whether it was arbitrary, capricious and lawful for the Secretary to deny the claim to the public land solely on suspicion of a fraudulent purpose on the part of the claimants, which fraudulent purpose he found was actually disproved by evidence before him.

2. Whether it was arbitrary, capricious and lawful for the Secretary, because of such suspicion, to increase the burden of proof with regard to the subject of value, and to deny the claim because the claimants had not sustained the increased burden.

REASONS FOR ALLOWANCE OF THE WRIT.

1. The Court of Appeals has decided a Federal question in conflict with decisions of this Court, in that, in the light of the facts, the effect of its decision is that suspicion is a lawful basis of decision by the Secretary of the Interior, acting as a quasi-judicial officer in the administration of the public land laws; that suspicion of fraud may be acted upon by such an officer as sufficient proof of fraud; and that because of such suspicion the burden of proof imposed on claimants with regard to the value of a mineral deposit may be increased.

2. The opinion of the Court of Appeals states: "The Government may dispense its bounty on such terms as it sees fit; * * *." Such a statement, read in the light of the facts of this case, indicates the view that the Secretary of the Interior has authority to give or withhold the public lands according to his own will, and not merely to administer the will of Congress.

3. The effect of the decision, read in the light of the facts to which it is applied, will be to put much, if not all, of the action of the Secretary in the administration of the land laws (and of many other quasi-judicial agencies as well), beyond the corrective jurisdiction of the courts.

PRAYER.

Wherefore, your petitioners respectfully pray that a Writ of Certiorari be issued to the United States Court of Appeals for the District of Columbia, commanding the Court to certify and send to this Court a full and complete transcript of the record and all proceedings in the case in said Court numbered and entitled on its docket "No. 8378, *Harold L. Ickes, as Secretary of the Interior, appellant, v. Donald L. Underwood, Cora Underwood, Pauline Underwood, et al.*"; and that the judgment of the Court of Appeals may be reversed by this Honorable Court, and that

your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. R. UNDERWOOD, ED. MICHALOWSKI,
Petitioners, by

.....
RUSSELL HARDY,
1625 K Street, N. W.,
Washington 6, D. C.

District of Columbia, ss:

Russell Hardy, being sworn, says he is the attorney for the petitioners named in the foregoing petition; that he has read the petition; that the facts stated therein are true so far as the same relate to his own acts and deeds, and so far as the same relate to the acts and deeds of any other person or persons, he believes them to be true; and that this petition is not filed for delay.

.....
Subscribed and sworn to before me June , 1944.

.....
Notary Public.





IN THE

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OCTOBER TERM, 1943.

No. ———.

DONALD L. UNDERWOOD, CORA UNDERWOOD,
PAULINE UNDERWOOD, D. W. UNDERWOOD,
ED. MICHALOWSKI, *Petitioners*,

v.

HAROLD L. ICKES, Secretary of the
Interior, *Respondent*.

**BRIEF FOR PETITIONERS IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI.**

The opinions of the courts below have not been reported. On October 23, 1941, the District Court filed a memorandum, which reads in full as follows:

On the admitted facts and the law in the case, the decision of the defendant shows prejudice and abuse of judicial discretion. Motion to dismiss filed by defendant on October 25, 1940, is overruled.

The opinion of the Court of Appeals was filed on March 20, 1944.

BASIS OF JURISDICTION.

The statute under which jurisdiction of this Court is invoked is section 240 (a) of the Judicial Code (28 C. A., sec. 347 (a)).

STATEMENT OF THE CASE.

A statement of the case is set forth in the preceding petition, p. 2.

QUESTIONS PRESENTED.

1. Whether it was arbitrary, capricious and lawful for the Secretary to deny the claim to public land solely on suspicion of a fraudulent purpose on the part of the claimants, which fraudulent purpose he found was actually disproved by evidence before him.

2. Whether it was arbitrary, capricious and lawful for the Secretary, because of such suspicion, to increase the burden of proof with regard to the subject of value, and to deny the claim because the claimants had not sustained the increased burden.

ARGUMENT.

The Decision of the Court of Appeals, in the Light of the Facts to Which it is Applied, is in Conflict With Decisions of this Court, and is Based Upon a Principle Which Would Revolutionize the Public Land Laws and Enable the Secretary of the Interior to Dispense the Public Lands as He Sees Fit.

The ultimate question for decision by the Secretary in the proceedings before him, was whether the location made by petitioners was a valuable mineral deposit. The controlling rule of law with regard to that question which the Secretary was required to apply in the administration of the public land laws, was whether a person of ordinary prudence would be justified in the further expenditure of

his labor and means, with a reasonable prospect of success, in developing a mineral deposit.

The rule was laid down in the leading case of *Chrisman v. Miller*, 197 U. S. 313, as follows:

By the Land Department this rule has been laid down (*Castle v. Womble*, 19 Land Dec. 455, 457):

“Where minerals have been found, and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby ‘all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase.’ ”

The inquiry with regard to value was pursued under five headings, set up as charges against petitioners, as follows: (1) the claim was located for purposes other than mining, (2) the claim was located for speculative purposes, (3) the claimants had not performed the amount of discovery work required by law, (4) mineral had not been found on the land in sufficient quantities to constitute a valid discovery, and (5) the land was non-mineral in character.

All of these charges were finally found in favor of petitioners. The claim was disallowed, however, because of a suspicion of fraud and by applying a supposed rule of evidence, arising upon that suspicion and which increased and made more onerous the burden of proof on petitioners with regard to value.

In the final decision against petitioners, of August 11, 1939, the Under Secretary said:

While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not

free from the suspicion by reason of the selection of the site for location that the possibility of appropriation thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. It is the opinion of the Department that in the decisions below there was material error in the estimation and appreciation of the evidence . . . (R. 116)

Petitioner sought a rehearing on the ground that the suspicion and this rule of evidence amounted to prejudicial error. The decision was upheld, however, and the rule even more strongly stated as follows:

I cannot agree that these remarks as to the burden of proof amount to prejudicial error. It is a settled rule in this Department that where land has a present or potential value for purposes other than mineral, that fact must be taken into consideration in determining the character of the land. Under such circumstances the evidence of mineral value, in order to sustain the validity of the claim, must be *more clear and convincing* than in cases where there is no conflict with other present or potential values. (R. 121.)

In all cases of a location on public lands, the two possibilities which constituted the basis for this suspicion exist. If the Secretary may base suspicion upon that foundation, and on top of that suspicion superimpose an additional requirement of proof, he may thus place an insuperable obstacle in the way of any claimant, and so fundamentally revolutionize the administration of the public land laws as to enable himself to give or withhold the public lands according to his own personal unlimited will.

As stated in the brief for the Secretary in the Court of Appeals, the claim "was held invalid *only* because appellees did not sustain their burden of proof".

In the proceedings against petitioners, the Secretary was exercising a judicial function, and, therefore, was required to act judicially. The decision of the Court of Appeals sustaining his action in this case is in conflict with rules laid down by this Court in many cases, including the following:

Riverside Oil Co. v. Hitchcock, 190 U. S. 316:

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands.

A judicial function must be exercised consistently with those fundamental requirements of fairness which are of the essence of proceedings of a judicial nature.

Morgan v. United States, 298 U. S. 468; 304 U. S. 1.

The judicial function excludes unlimited or arbitrary power. It excludes any power to enlarge or curtail the rights of parties. It excludes any power to substitute the will of the judicial officer for the will of Congress, as manifested in the statutes.

West v. Standard Oil Co., 278 U. S. 200.

Payne v. Central Pac. R. Co., 255 U. S. 228.

Daniels v. Wagner, 237 U. S. 547.

Any attempt by an official having a judicial function to deprive parties of rights, may be corrected by the courts.

Cornelius v. Kessel, 128 U. S. 456.

West v. Standard Oil Co., 278 U. S. 200 (reversing 57 App. D. C. 329, 23 Fed. (2d) 750), holding that the Secretary of the Interior has no authority to make grants of public lands on facts outside the scope of the statute.

Daniels v. Wagner, 237 U. S. 547 (1915), in which this Court condemned a conception of "discretionary" authority like that revealed in the decision made in the Interior

Department in this case, and approved by the Court of Appeals.

The decision of the Court of Appeals is in conflict with decisions of this Court to the effect that courts and quasi-judicial officers may not lawfully defeat rights of parties, upon suspicion (especially as proof of fraud), or upon facts and circumstances not shown by the evidence, or upon rumor, surmise or remote hearsay. "Suspicion may deserve great attention", said Chief Justice Marshall, but "the ministers of justice ought not officially to entertain it." (Burr's Trials, Vol. 1, pp. 16-17.)

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 230.

Morgan v. United States, 304 U. S. 1, 19-20.

Morgan v. United States, 298 U. S. 468, 480-481.

Ubarri v. Laborde, 214 U. S. 168.

Clark v. Reeder, 158 U. S. 505, 523, 524.

United States v. Hancock, 133 U. S. 193.

United States v. Maxwell Land-Grant Co., 121 U. S. 325.

The decision of the Court of Appeals is in conflict with decisions of this Court to the effect that the Secretary, in the administration of the public land laws, is executing not his own will, but that of Congress, and that he is not an agent to give or withhold the public lands on any theory of personal or unlimited "discretion", or, as is indicated in the opinion of the Court of Appeals, that as to the public lands he constitutes the Government and may dispense its bounty as he sees fit.

West v. Standard Oil Co., 278 U. S. 200.

Daniels v. Wagner, 237 U. S. 547.

Respectfully submitted,

.....
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Of Counsel.



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JUL 5 1944

CHARLES ELMORE ORR
CLERK

No. 120

In the Supreme Court of the United States

OCTOBER TERM, 1944

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAU-
LINE UNDERWOOD, D. W. UNDERWOOD, ED.
MICHALOWSKI, PETITIONERS

v.

HAROLD L. FOLKES, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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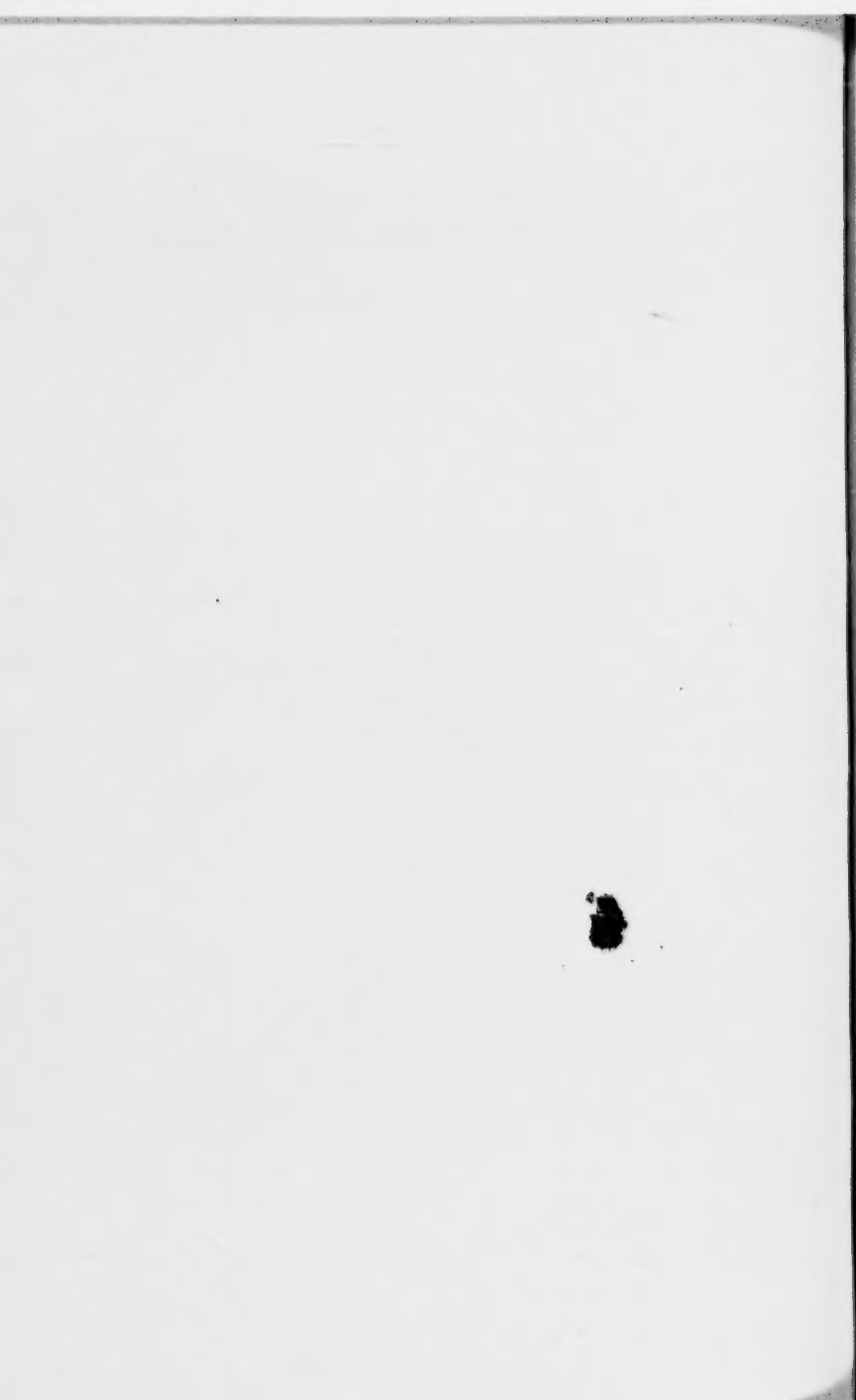
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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 120

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI, PETITIONERS

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 227-231) is reported in 141 F. (2d) 546. The district court wrote no opinion and made no findings of fact.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1944 (R. 232). The petition for a writ of certiorari was filed on June 2, 1944. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Petitioners, five of seven locators of a placer claim for sand and gravel under the United States mining laws, sought a mandatory injunction ordering the respondent to set aside his final decision of June 14, 1940 (R. 117-122), by which, after lengthy hearings in accordance with the established quasi-judicial procedure of the Department of the Interior, the respondent held that the sand and gravel in that claim did not constitute a valuable mineral deposit. The question is whether the court of appeals was correct in holding that the respondent's decision was within the scope of his authority and was neither arbitrary nor capricious.

STATUTES INVOLVED

The provisions of the Revised Statutes under which the petitioners made their location are as follows:

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. (30 U. S. C., Sec. 21.)

SEC. 2319. Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to ex-

ploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. (30 U. S. C., Sec. 22.)

STATEMENT

The Sand Hill claim was located by the petitioners on November 11, 1933, approximately 11½ miles north of the site of the Grand Coulee Dam on the Columbia River (R. 4, 40). The deposit of sand and gravel, according to Donald L. Underwood, the most active of the petitioners, was "visible with the eye" (R. 155). Although this location was made in accordance with the formalities required by law (R. 3-4), the respondent found that the substantive statutory requirement that the location contain a valuable mineral deposit was not satisfied. This claim is within a half-mile of the great Brett gravel pit (R. 170) from which 11 million cubic yards of sand and gravel were taken for the construction of the Grand Coulee Dam. Nevertheless, that pit was found to be worthless in a condemnation proceeding. *Brett v. United States*, 86 F. (2d) 305 (C. C. A. 9),

certiorari denied, 301 U. S. 682.¹ The Government became aware of the existence of the claim when the petitioners, asserting ownership of this claim, sought to intervene in the condemnation proceedings brought by it to acquire land needed in connection with the construction of the Grand Coulee Dam. The final judgment in the condemnation proceeding expressly excepted and did not affect the mineral rights, if any, of the petitioners. (R. 41-42.)

Because sand and gravel are so plentiful in the area of Grand Coulee Dam as to be worthless, and because the location had been made while the Government was negotiating with the owner of the surface of the land to purchase a part of the land, an investigation was ordered to be made. As a result of an adverse report, proceedings against the claim were ordered instituted by the Commissioner of the General Land Office on April 5, 1934. (R. 42.) The decision of the Commis-

¹ The circuit court of appeals in that case said of the Brett gravel deposit, at page 306: "There was uncontradicted testimony that the land contains from 35,000,000 to 60,000,000 cubic yards of good quality sand and gravel. However, the testimony shows that, commercially, the sand and gravel has no value, except in its use in constructing the dam. *The reason is that the cost of delivering processed gravel from the land in controversy to the nearest towns of any size where there would be a market, is six to seven times the retail price of gravel in those towns.*" [Italics supplied.]

The Government permits people to obtain gravel without charge from the part of the pit not needed for government work (R. 200).

sioner against the validity of the claim was sustained by the Secretary on appeal, on the ground that the sand and gravel were not a valuable mineral deposit since they could not be mined, removed, and disposed of at a profit, and a motion for rehearing was denied (R. 74-82, 83-85). The petitioners' request that the respondent exercise his supervisory authority was finally granted in part (R. 87-101), to enable them to substantiate their claim that the deposit had a present or prospective market value. A second hearing was had. The Commissioner found in favor of the petitioners but was reversed by the respondent because the evidence did not show that there was a demand or market for the deposit either presently or prospectively (R. 107-117). A motion for rehearing was denied (R. 117-122).²

The evidence upon which the respondent based his decision that the Sand Hill location did not contain a valuable mineral deposit may be summarized as follows: Petitioners had conceded that on November 11, 1933, when the notice of discovery was posted on the claim, the area of the dam and the surrounding country were wild desert land, uninhabited and unimproved, lacking sufficient population to invite the use of sand and gravel as a commercial commodity (R. 105). The only issue, therefore, was as to prospective value.

² Obviously, the petitioners must be mistaken when they assert (Pet. 4, 13) that the facts were finally found by the respondent in their favor, for the opinion of the Under Secretary is plainly adverse to petitioners (R. 116).

The testimony on this point was carefully evaluated in the decisions (R. 113-115, 122). The Under Secretary concluded that the petitioners had shown only a limited market for sand and gravel in the Grand Coulee Dam area and that the deposits in question were not "either presently or prospectively valuable" at the time of the withdrawal because there was no showing that they were "so situated or * * * of such superior quality as to point to the probability that they would be sold", especially "because of the abundance, availability and free access to" other deposits in the area (R. 116).

While paragraph XVI of the complaint (R. 11-12) alleges a total production of over 40,000 cubic yards at and near Grand Coulee during a two-year period, this figure includes a duplication of 10,500 yards in connection with H. P. Dorsey's³ production, which if eliminated leaves 31,920 cubic yards over a four-year period (R. 115). Of this amount 5,270 yards were a donation by the United States to a town which lacked funds (R. 12, 114-115), and 22,500 yards were for public work at the dam for which the sand and gravel deposit from this location was not acceptable (R. 114). This leaves only 4,150 yards of actual sales in four years which, even if valued at 10 cents per yard (R. 115), rep-

³ Dorsey operated a sand and gravel producing plant near the Grand Coulee Dam (R. 114).

resents only an average annual sale of \$103.75. The conclusion that this is a limited market is fortified by the agreement of the credible testimony on both sides as to the "abundance, availability and free access" to the sand and gravel deposits in the area of the dam (R. 111-112, 116, 200). The testimony that the state highway program offered a market was rejected because the petitioners' own witness stated that, with two minor exceptions, the Sand Hill location could not have competed with other sources because of the high cost of transportation and because gravel was available from nearby roadside pits along the construction routes (R. 112, 113). Nor did the Columbia Basin project, whose nearest boundary is 50 miles distant from Sand Hill,⁴ offer a prospective market. The testimony overwhelmingly showed that the project area had more than adequate quantities of sand and gravel and that the Sand Hill claim could not compete because of the high cost of truck transportation and the absence of railroad transportation (R. 111-112).

Shortly after respondent finally declared the Sand Hill claim invalid, the petitioners instituted this suit in the district court. Upon the denial of respondent's motion to dismiss the complaint (R. 27), he filed his answer (R. 27-57), which denied

⁴ The northernmost part of the area is 50 miles south of Grand Coulee Dam. Hearings, H. Com. on Irrigation and Reclamation, H. R. 6522, 77th Cong., 2d sess. (1942), p. 46.

all the material allegations of the complaint.⁵ Subsequently, the petitioners' motion for summary judgment was granted (R. 123) and a motion for rehearing denied (R. 124). Judgment issued in favor of the petitioners (R. 128-129), that the Departmental determinations be set aside and the proceedings dismissed, that patents issue to the petitioners, and that the Government be enjoined from interfering with them in the removal of sand and gravel from the claim.

The court of appeals reversed the judgment of the district court (R. 232). In its opinion, the court stated the familiar rule that the judicial power will not be interposed to limit or direct the exercise of discretion by public executive officers with respect to pending matters within their jurisdiction except in clear cases of illegality of action. The court pointed out that the decision of the respondent rested upon his finding of fact that the deposits of sand and gravel were neither presently nor prospectively valuable before or at the time of the appropriation of the land for public use, that his findings have abundant support in the record and are clearly within his authority, and that the decision, since there was no showing of fraud or imposition, is conclusive.

⁵ Although the petitioners state (Pet. 3), as a fact presumably not controverted, that they had spent in excess of \$5,000 in preliminary efforts (R. 3), this is denied by the answer (R. 28). Nor is there any testimony in the record that the deposit was worth \$262,013.88, as claimed (Pet. 3), or any other figure.

ARGUMENT

The petitioners claim that the court of appeals held that the respondent could substitute his personal will for that of Congress and therefore the decision is in conflict with decisions of this Court that an executive officer may not act in an arbitrary and capricious manner. The opinion of the court of appeals, however, cannot be so interpreted. On the contrary, it is in accord with the many decisions of this Court that the judiciary cannot interfere either by mandamus or injunction with executive officers in the discharge of their official duties which involve the exercise of judgment and discretion, unless there is clear illegality of action. *Bates & Guild Co. v. Payne*, 194 U. S. 106, 108-109; *Waite v. Macy*, 246 U. S. 606, 608; cf. *Northwestern Co. v. Federal Power Commission*, 321 U. S. 119, 124.

In the application of this rule, the Secretary of the Interior does not constitute an exception. *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324-325; *Alaska Smokeless Coal Co. v. Lane*, 250 U. S. 549, 555. Especially is this true, where, as in this case, he has been entrusted by Congress with the duty of disposing of a gratuity, valuable mineral deposits, by the Government. Cf. *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 237. Under such circumstances, he clearly has authority to determine whether the mining location claimed by the petitioners is valid. *Cameron v. United States*, 252 U. S. 450, 459. The respondent, as

the supervising agent of the Government over the public lands, is best qualified to determine as a fact the known mineral character of the land. *West v. Standard Oil Co.*, 278 U. S. 200, 220.

The petitioners no longer deny this, but now assert, without citing the record, that although the respondent found the issues of fact in their favor (Pet. pp. 4, 13, but see fn. 2, p. 5, *supra*) he held their claim invalid because of an element of suspicion. In short, the petitioners charge that the respondent disregarded his findings of fact in making his decision. Since the record definitely contradicts the petitioner's contention that the findings of fact were in their favor, there is no foundation for the issuance of a writ of certiorari. In their complaint (R. 11, Par. XV), the petitioners state that the claim was held void on the ground that the land was non-mineral in character. The decisions of August 11, 1939, and June 14, 1940, contain findings of fact (R. 111, 122) that the deposits of sand and gravel in question were neither presently nor prospectively valuable for minerals before or at the time of the appropriation of the land for public use. Such a determination by the respondent is conclusive in the absence of fraud or imposition. *Cameron v. United States*, 252 U. S. 450, 464.

This Court has ruled that the test for resolving this factual question as to value is whether a person of ordinary prudence would be justified in

the further expenditure of his labor and means, with a reasonable prospect of success, in developing a paying mine. *Chrisman v. Miller*, 197 U. S. 313, 322; *Cameron v. United States*, *supra*, at 459. If, as in this case, the question is not as to the quantity of the low-grade non-metalliferous mineral, but as to its value, the rule uniformly has been that the proof must show that the deposit can be extracted, transported, and marketed at a profit. *United States v. Lillibridge*, 4 F. Supp. 204, 206 (S. D. Cal. 1932); *Opinion of the Acting Solicitor*, 54 I. D. 294 (1933); *Big Pine Mining Corporation*, 53 I. D. 410 (1931); *Layman v. Ellis*, 52 L. D. 714 (1929); *Gray Trust Co.*, 47 L. D. 18, 20 (1919); *Holman v. State of Utah*, 41 L. D. 314 (1912); Clark, Heltman & Consaul, *Mineral Law Digest* (1897), page 346. This long continued administrative construction by the department charged with the application and enforcement of the statutory provision is entitled to great weight. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 311-315; cf. *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 275.

The petitioners allege arbitrary and capricious action on the part of the respondent because of portions of the decisions of August 11, 1939, and June 14, 1940 (Pet. 13-14), relating to the quantum of proof. These opinions, it is contended, imposed an unusual and additional requirement

of proof which would "revolutionize the administration of the public land laws."

The two decisions, however, are in accord with the firmly established rule that when land is sought to be taken out of the category of agricultural land, the evidence of its mineral character should be reasonably clear.⁶ *Chrisman v. Miller*, 197 U. S. 313, 323; *United States v. Lillibridge*, 4 F. Supp. 204, 206 (S. D. Cal. 1932). This rule

⁶ Compare the following paragraph taken from the decision of the respondent on the first appeal (R. 80) :

"The proof of marketability of the deposit should be clear and convincing in cases where the land has value for other purposes, such as for timber. *E. M. Palmer* (38 L. D. 295); *Helen V. Wells et al.* (54 L. D. 307). In the present case, the testimony shows, and furthermore the Department will take judicial notice of the fact, that at the time the claim was located the Columbia Basin Commission had entered into a contract with the United States to expend \$300,000 of State money in preliminary work in connection with the Coulee Dam project; that a large number of men were on the ground employed by the Commission and the Government engaged in preliminary work, test pit exploration, examination of sand and gravel pits for construction purposes; that the Federal Emergency Administrator of Public Works had already made an allotment of \$63,000,000 for the construction of the dam site, concerning which great publicity had been given. The probability that the land in question, by reason of its proximity to the dam site, would have a condemnation value might be reasonably anticipated, which renders it more incumbent upon the mineral claimants to clearly overcome the Government's evidence that the deposit is unmarketable."

is applicable whenever there is, as in this case, a non-mineral use of the land. *E. M. Palmer*, 38 L. D. 294, 298 (1909); *Helen V. Wells*, 54 I. D. 306, 309 (1933); *Austin v. Mann*, 56 I. D. 85, 87 (1937). Nor does the application of this rule as to the burden of proof constitute a determination based upon suspicion. In the *Wells* case, *supra*, it was said at pages 309-310:

No bad faith is charged or proven in this case, nevertheless, the fact that the tracts in controversy contain more or less valuable timber and timber that will grow into value, supplies an additional reason for clear and convincing evidence that the land is valuable for mineral before title should pass from the United States.

CONCLUSION

The respondent's findings of fact and decision that the petitioners had not located a valuable mineral deposit are supported by substantial evidence in the record. Since there is no showing of fraud or imposition the district court was without authority to substitute its judgment for that of the respondent. Neither the decisions of the respondent nor the decision of the court of appeals are in conflict with any prior decisions of this Court relating to quasi-judicial administrative proceed-

ings or the disposition of the public lands. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1944.





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CLERK OF THE COURT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1944.

No. 120.

DONALD L. UNDERWOOD, CORA UNDERWOOD, PAULINE UNDERWOOD, D. W. UNDERWOOD, ED. MICHALOWSKI,
Petitioners,

v.

HAROLD L. ICKES, Secretary of the Interior, *Respondent.*

REPLY BRIEF.

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REPLY BRIEF.

The Brief in Opposition seeks, probably with some success, to draw attention away from the fact that the decision of Respondent against Petitioners was based on suspicion and the application of a harsh and unlawful rule of evidence. The object seems to be to convert the case into one in which his findings of fact are questioned. Petitioners make a distinction between the findings of fact of Respondent and his rule of decision and ministerial action on those findings.

Petitioners rely on the rule that the findings of fact made by the Secretary are conclusive. They seek the benefit of the rule that they are conclusive upon the Secretary as well as upon Petitioners, and may not be reviewed and

reversed by the courts, even at the instance of the Secretary for the purpose of defeating a claimant in whose favor he has found the facts, in the absence of fraud. We strenuously support his findings, condemn his rule of decision, and demand ministerial action consistent with those findings.

In order to escape the fact that the decision against Petitioners was based on suspicion and a rule that that suspicion increased the burden of proof, Respondent seeks to show that his findings in favor of Petitioners were erroneous. For that purpose, Respondent submits a statement consisting principally of a recitation of fragments of the testimony in the administrative hearings. (Brief pp. 4-7)

But the ultimate findings of the Respondent based on all of the evidence in those hearings upon the several charges made, were contrary to the fragments recited, and are shown as follows:

1) *Discovery work.* The Commissioner, in his decision of July 10, 1935, affirmed the finding of the Register that the necessary amount of discovery work had been done. (R. 60, 63.) That charge was then abandoned and in none of the subsequent decisions was it noticed.

2) *Mineral character of deposit.* That sand and gravel is a mineral was decided by the Register, and in none of the subsequent decisions was that finding controverted or reversed. (R. 60.)

3) *Quantity and quality.* The Commissioner, in his decision of July 10, 1935, affirmed the favorable finding of the Register with regard to quantity, and that finding was not subsequently controverted or reversed. (R. 60, 64, 71.) As to quality, the ultimate finding in favor of petitioners was stated in the final decision of August 11, 1939, as follows:

The decided weight of the evidence is to the effect that the lime coating such as exists on the material in question has not been considered an objection to its

use for concrete construction generally, and is not such a defect as would chill its sale for such purposes. (R. 110.)

4) *Value*. The final decision of the Commissioner, which was overruled on the suspicion rule, held as follows with regard to value:

As to the present or prospective value of the Sand Hill deposits, the vast area to be irrigated, the high-ways to be constructed, and the many concrete structures that must necessarily be built, the evidence, including the Columbia Basin reports, **CONCLUSIVELY SHOWS** that there was at the critical dates mentioned a prospective or potential market value for the sand and gravel deposits. (R. 107.)

Prospective value, thus decided for Petitioner, was then, as admitted in the Brief for the Respondent, the only issue in the case. (Brief, p. 5.) But this finding was reversed by the Under-Secretary for the reasons shown in the following words:

Considering the facts and circumstances relative to the known conditions at the time of the withdrawal, they are not such as to *impel the conclusion* that the deposits in question were either presently or prospectively valuable at that time.

The decision goes on to state that they did not "impel the conclusion" because of the suspicion and the failure to sustain the increased burden of proof. The Under-Secretary immediately added:

The claimants here shortly before the withdrawal located these deposits on the terrace of the river situated about a mile and a half from the proposed dam. While there is no positive evidence in the record either that the claimants knew or that it was a matter of general knowledge that the land would be appropriated by the Government, nevertheless the case is not free from the suspicion by reason of the selection of the site for location that the possibility of appropri-

tion thereof by the Government might have been contemplated by the parties, and this possibility was a material inducement for the location. In these circumstances it was all the more incumbent on the claimants, in order to secure a reversal of the previous judgments, to establish with reasonable certainty that the sand and gravel on the claim were commercially valuable. (R. 116.)

In refusing a rehearing, the statement was made by Respondent that in such case the evidence necessary to sustain a claim "must be more clear and convincing". (R. 121.)

Respondent has boldly confessed that Petitioners' failure to sustain this burden of proof, was his reason for disallowing the claim. As stated in his brief in the Court of Appeals, the claim "was held invalid ONLY because appellees did not sustain their burden of proof."

A decision made in the exercise of a judicial function, which is based upon or materially affected not only by suspicion but also by a failure to dispel that suspicion by "more clear and convincing" evidence than is otherwise required, comes well within the "fraud or imposition" which, as recognized in the Brief in Opposition, will vitiate any decision of Respondent in the administration of the public lands.

Respectfully submitted,

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